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VIA ELECTRONIC MAIL AND FACSIMILE

Committee for Purchase from People
Who Are Blind or Severely Disabled
1421 Jefferson Davis Highway
Jefferson Plaza 2, Suite 10800
Arlington, VA 22202-3259

Re: Docket No. 2004-01-01; Governance Standards for Central nonprofit Agencies
and Nonprofit Agencies Participating in the Javits-Wagner-O'Day Program
Notice of Proposed Rulemaking and Request for Comments; 69 Fed. Reg. 65395
(November 12, 2004)

Dear Sir or Madam:

On behalf of the National Association for the Employment of People Who Are Blind ("NAEPB"), I am submitting comments on the above-referenced notice of proposed rulemaking.¹ NAEPB is a national association whose members are nonprofit agencies for the blind located in and organized under the laws of numerous states of the United States. NAEPB, through its 61 constituent members, seeks to develop jobs and economic opportunities for persons who are blind through the Javits-Wagner-O'Day ("JWOD") Act program as well as through numerous private and public programs designed to improve employment prospects for persons who are blind so that they may achieve personal and financial independence. In short, NAEPB is committed to the implementation and improvement of all relevant programs, including JWOD.

The Notice of Proposed Rulemaking, published in the Federal Register on November 12, 2004 (69 Fed. Reg. 65395), solicited comments on governance standards that the Committee for Purchase from People Who Are Blind or Severely Disabled ("Committee") asserts will "help

¹ NAEPB hereby incorporates by reference its December 13, 2004 comments on the information collection and certifications and required determinations aspects of the notice of proposed rulemaking. NAEPB will not repeat those arguments in this submission.

promote sound governance procedures for central nonprofit agencies and nonprofit agencies participating in the JWOD Program, help ensure the effective and transparent administration of Government contract funds, and continue to maintain a high level of support for the JWOD Program's employment mission." 69 Fed. Reg. 65395. Citing isolated instances of allegedly excessive executive compensation, a perceived lack of full financial reporting, and the alleged (and admittedly isolated) absence of guidelines for the establishment of a particular non-profit agency's board of directors, the Committee now proposes rules that would restrict participation in the JWOD program to non-profit agencies that agree to abide by certain Committee-imposed restrictions on their internal board governance practices and limits on the compensation to be paid to agency executives.

The Committee readily acknowledges that the overwhelming majority of JWOD affiliated agencies conduct business in an ethical and accountable manner. Nonetheless, the Committee contends that the proposed board governance and executive compensation regulations are necessary because of the allegedly unethical actions of two of the several hundred JWOD affiliated agencies. The Committee asserts that this "isolated" behavior warrants placing additional administrative and financial burdens on hundreds of non-profit agencies that are clearly acting within the law. NAEPB respectfully disagrees with the Committee's conclusions in this regard and, among other things, contends that the proposed rulemaking is redundant, unnecessary, and unauthorized. The JWOD affiliated agencies are organized under various state laws with which they must comply and which are enforced by state attorneys general. The agencies are overseen and controlled by boards of directors that are often comprised of community leaders and state and local government officials. The JWOD affiliated agencies are also subject to significant federal requirements, including those established by the Internal Revenue Service. Thus, there are clearly established mechanisms in place to monitor and hold accountable the non-profit JWOD affiliated agencies. Simply put, there is no need for the Committee to impose the requirements contained in the proposed rulemaking. By attempting to usurp the authority of state regulatory bodies, the Committee's proposed rulemaking has inescapable federalism implications.

Significant is the obvious conclusion that the Committee has no legal authority to promulgate rules regarding the executive compensation and/or board governance of the participating non-profit agencies, nor can the Committee amend the JWOD Act in order to grant to itself the authority to enact the proposed regulations. The proposed rulemaking exceeds the scope of the Committee's congressional mandate and contravenes the JWOD Act. Moreover, by establishing compliance with the proposed rules as a prerequisite to participation in the JWOD program, a precondition that is without precedent in government procurement, the Committee has violated fundamental principles of equal protection. As a result, the proposed rules would likely be deemed invalid by a court of competent jurisdiction.

Instead of promoting the JWOD mission, if it becomes final, the proposed rule will impact negatively many of NAEPB's members as well as other non-profit agencies for the blind and severely disabled. Moreover, if finalized, the proposed rule will adversely impact the Committee's ability to promote and administer the JWOD program because the Committee will

necessarily become an accrediting organization with a plethora of additional responsibilities for which the Committee has neither the staff nor the resources to assume. The JWOD program – the very thing the Committee is charged with protecting – will suffer irreparable damage.

The Proposed Rulemaking Exceeds the Scope of the Committee's Congressional Mandate

Given the express and unambiguous purpose of the JWOD program to “to create jobs and training opportunities for people who are blind or have severe disabilities”, 69 Fed. Reg. 59,185 (Oct. 4, 2004), and the fact that neither the JWOD statute, implementing regulations or the accompanying legislative history speak to the Committee's authority to impose regulations regarding corporate governance and executive compensation on the JWOD agencies, with its proposed rulemaking, the Committee is clearly exceeding the scope of its Congressional mandate.

The Committee Has No Authority Under the Act to Promulgate the Proposed Rulemaking

The JWOD statute, as amended, 41 U.S.C. §§ 46-48, delegates certain duties and powers to the Committee. Section 2 of the JWOD statute, 41 U.S.C. § 47, sets forth these duties and powers as follows:

1. to establish and publish a procurement list in the federal register of “the commodities produced by any qualified nonprofit agency for the blind or by any qualified nonprofit agency for other severely handicapped, and . . . the services provided by any such agency.” The Committee is also authorized to add or remove from the procurement list “commodities so produced and services so provided.” 41 U.S.C. § 47(a).
2. to “determine the fair market price of commodities and services” and the power to revise such market price in accordance with changing market conditions. 41 U.S.C. § 47(b).
3. to designate a central nonprofit agency or agencies “to facilitate the distribution . . . of orders of the Government for commodities and services on the procurement list among qualified nonprofit agencies for the blind or such agencies for other severely handicapped.” 41 U.S.C. § 47(c).
4. to “make rules and regulations regarding (A) specifications for commodities and services on the procurement list, (B) the time of their delivery, and (C) *such other matters as may be necessary to carry out the purposes of this Act.*” 41 U.S.C. § 47(d) (emphasis added). 41 U.S.C. § 47(d) also requires the Committee to prescribe regulations that prioritize the purchase of goods and services from qualified agencies for the blind.²

² Section 5 of the JWOD statute, 41 U.S.C. § 48b, defines a “qualified nonprofit agency for the blind” as an agency:
(footnote continued on next page)

5. to make a continuing study and evaluation of its activities under this Act for the purpose of assuring effective and efficient administration of this Act. The Committee my study (on its own or in cooperation with other public or nonprofit private agencies) (1) problems related to the employment of the blind and of other severely handicapped individuals, and (2) the development and adaptation of production methods which would enable a greater utilization of the blind and other severely handicapped individuals. 41 U.S.C. § 47(e).

The Committee is given the power and duty "to make rules and regulations regarding . . . such other matters as may be necessary to carry out the purposes of this Act." 41 U.S.C. § 47(d). However, this authority is not open ended and is specifically limited by the language of the JWOD statute and must indeed be "*necessary to carry out the purposes of this Act.*" The "purpose" of the JWOD statute is to "increase the employment opportunities for the blind and other severely handicapped and, whenever possible, to prepare them to engage in normal competitive employment." S. Rep. No. 105-251, Pub. L. No. 105-368 (July 15, 1998). The Committee is charged with furthering this purpose by prioritizing the purchase of commodities and services from qualified non-profit agencies. Nowhere in the JWOD statute is the Committee given any authority to establish standards for board governance or executive compensation. Furthermore, the JWOD statute nowhere defines qualified non-profit agency as one that is compliant with board governance and compensation rules promulgated by the Committee.

It is unequivocal that the purpose of the JWOD statute is to broaden opportunities, and it is *not* to impose greater qualification requirements on JWOD agencies than those qualifications mandated by Congress and defined in the JWOD statute. This latest interpretation advanced in the proposed rulemaking clearly runs afoul of the Congressional authorization and, thus, results in an invalid and unlawful regulation by the Committee. See Nat'l Retired Teachers Ass'n v. United States Postal Serv., 430 F. Supp. 141, 145 (D.D.C. 1977)("it is well settled that a regulation which exceeds Congressional authorization is invalid")(citing Manhattan Gen. Equip.

(footnote continued from previous page)

(A) organized under the laws of the United States or of any State, operated in the interest of blind individuals, and the net income of which does not inure in whole or in part to the benefit of any shareholder or other individual;

(B) which complies with any applicable occupational health and safety standard prescribed by the Secretary of Labor; and

(C) which in the production of commodities and in the provision of services (whether or not the commodities or services are procured under this Act) during the fiscal year employs blind individuals of not less than 75 per centum of the man-hours of direct labor required for the production or provision of the commodities or services.

41 U.S.C. § 48b(3). A similar definition is provided for the term "qualified nonprofit agency for other severely handicapped" which permits 75% of the man-hours to direct labor to be performed by the blind or severely handicapped. 41 U.S.C. § 48b(4).

Co. v. Comm'r of Internal Revenue, 297 U.S. 129, 134 (1936)). "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988). "It remains a fundamental principle of administrative law that agencies may not self-levitate their power to promulgate regulations- they must rather find any such power in a source conferred by Congress." Respect Incorporated v Committee on the Status of Women, 815 F. Supp. 1113, 1123 (N.D. Ill. 1993). "Though an agency may promulgate rules or regulations pursuant to authority granted by Congress, no such rule or regulation can confer on the agency any greater authority than that conferred under the governing statute." Killip v. Office of Personnel Management, 991 F.2d 1564, 1569 (Fed. Cir. 1993).

The Committee's unilateral attempt to expand the scope of its authority does not advance the public policy goals of the JWOD statute. Moreover, there is no connection whatsoever between the proposed rulemaking and the Committee's power to impose rules that are "necessary" to the central purpose of JWOD. Instead, by imposing unauthorized, unnecessary, and burdensome requirements on the non-profit agencies, the Committee will likely hinder employment and training opportunities for the blind and severely disabled as fewer and fewer agencies will be able to participate in the JWOD program.

The Proposed Rules Are Inconsistent with the Committee's Regulatory Authority

The implementing regulations of the JWOD statute do not authorize the Committee to impose regulations regarding corporate governance and executive compensation on the JWOD affiliated agencies. The regulations state explicitly that "it is the policy of the Government to increase employment and training opportunities for persons who are blind or have other severe disabilities through the purchase of commodities and services from qualified nonprofit agencies employing persons who are blind or have other severe disabilities. . . [and] [t]he Committee is responsible for implementation of a comprehensive program designed to enforce this policy." 41 C.F.R. 51-1.1(a). The regulations expressly state that the "Committee is responsible for carrying out the following functions *in support of its mission* of providing employment and training opportunities for persons who are blind or have other severe disabilities and, whenever possible, preparing those individuals to engage in competitive employment." (emphasis added). Like the statute itself, the language of the regulations authorizing the Committee's powers are limited and relate to the Committee's duty to "assure effective implementation of the JWOD Act."

Further, the JWOD implementing regulations provide the same qualification requirements for the non-profit agencies as set forth in the statute. 41 C.F.R. § 51-4; see also 41 U.S.C. § 48b(3) & (4) (defining "qualified nonprofit agency for the blind" and "qualified nonprofit agency for other severely handicapped"). They dictate the initial qualification requirements of JWOD agencies as well as the qualifications that must be met in order to maintain participation as a JWOD agency. Nowhere do the regulations mention board governance or limits on executive compensation. Accordingly, by attempting to impose additional qualification requirements on JWOD affiliated agencies, the Committee is exceeding the authority granted to it by Congress, and, as such, the proposed rulemaking is invalid and illegal. See Nat'l Retired Teachers Ass'n v. United States Postal Serv., 430 F. Supp. 141, 145

(D.D.C. 1977); Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue, 297 U.S. 129, 134 (1936) ("The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity."). Neither the JWOD statute nor the implementing regulations authorize the Committee to regulate corporate governance and executive compensation matters of the JWOD agencies or authorize the Committee to undertake such rulemaking.

The Legislative History Does Not Permit the Committee's Attempt to Expand its Authority

The legislative history surrounding the JWOD program makes unequivocal the purpose of the JWOD program and the role of the Committee in furthering the program's goals. It is clear from the legislative history that Congress intended the Committee to serve in an administrative capacity over a procurement system designed to enhance employment and training opportunities for the blind and severely disabled. It is also unambiguous that Congress did not intend for the Committee to act as a regulatory and accreditation body for the charitable non-profit sector. The legislative history surrounding the passage of the 1971 amendment to the JWOD statute focuses on the commodities and services provided by JWOD agencies to the government and does *not* discuss matters of corporate governance or executive compensation of the participating JWOD agencies nor the Committee's ability to regulate such matters. See S. Rep. No. 93-908, Pub.L. No. 93-358 (June 13, 1974) ("The Wagner-O'Day Act of 1938 created a Committee on Purchases of Blind-Made Products to provide employment opportunities for the blind in making products needed by the Federal Government which the Government would otherwise procure on the open market.")

Congress enumerated the duties of the Committee in both the JWOD statute and the accompanying legislative history, making clear its intent with respect to the duties of the Committee. H.R. Rep. No. 92-228, Pub. L. No. 92-28 (June 7, 1971). Specifically, Congress authorized the Committee to "establish and publish in the Federal Register a procurement list of commodities and services of the blind and other severely handicapped which the Committee determines are suitable for procurement by the Government"; to follow a protocol for adding or removing "any commodity or service from the [Procurement] list[; and] . . . to prescribe by regulation a procurement priority for commodities and services of the blind; . . . to conduct a continuing study and evaluation of its activities, the operation of the act, and is authorized to study (alone or with others) problems involved in the employment of the blind and other severely handicapped, as well as the development and adaptation of production methods to enable a greater use of such individuals." H.R. Rep. No. 92-228 (June 7, 1971).

In 1998, Congress described the Committee's primary objective as one to "increase the employment opportunities for the blind and other severely handicapped and, whenever possible,

to prepare them to engage in normal competitive employment.”³ S. Rep. No. 105-251, Pub. L. No. 105-368 (July 15, 1998). Also, Congress stated that the Committee staff duties include: “supervis[ing] the selection and assignment of new commodities and services, assist[ing] in establishing prices, review[ing] and adjust[ing] these prices, [and] verif[y]ing the qualifications of workshops, and monitor[ing] their performance.” Id. According to Congress, the Committee is charged with monitoring the designated central nonprofit agencies (NIB and NISH) to “assure that all funds acquired by each such agency from nonprofit agencies for the blind and other severely handicapped in conjunction with the Javits-Wagner-O’Day Program be used solely for activities that are *consistent with the goal of the program, which is to generate employment and training opportunities for persons who are blind or have other severe disabilities.*” Id. (emphasis added).

To the extent its intent was previously unclear, in 2000, Congress stated that the Committee’s “primary objective is to use the purchasing power of the Federal Government to provide people who are blind or have other severe disabilities with employment and training that will develop and improve job skills as well as prepare them for employment options outside the JWOD program.” S. Rep. No. 106-500, 2000 WL 1517014 (June 2000). Congress stated that “the Committee’s duties include promoting the program; determining which products and services are suitable for Government procurement from qualified nonprofit agencies serving people who are blind or have other severe disabilities; maintaining a procurement list of such products and services; determining the fair market price for products and services on the procurement list; and making rules and regulations necessary to carry out the purposes of the Act.” Id. In addition, Congress stated that the Committee’s “staff responsibilities include promoting and assessing the overall program, supervising the selection and assignment of new products and services; assisting in establishing prices; reviewing and adjusting these prices; verifying the qualifications of nonprofit agencies; and monitoring their performance.” Id. Congress has expressed these purposes and duties of the Committee as recently as 2002 and 2003. See also, S. Rep. No. 107-212, Treasury and General Government Appropriation Bill, 2003 (July 17, 2002); S. Rep. No. 108-146, Treasury and General Government Appropriations Bill, 2004 (September 8, 2003).

The goals of the JWOD program were reiterated on October 4, 2004 in a notice published in the Federal Register in which the Committee stated that JWOD’s purpose was to “to create jobs and training opportunities for people who are blind or have severe disabilities.” 69 Fed. Reg. 59,185 (Oct. 4, 2004). From JWOD’s inception, Congress has been definitive as to the limits on the Committee’s authority and the role of the Committee as an administrative entity. The Committee’s powers and duties have been narrowly drawn for purposes of establishing a public market for goods and services provided by the blind and disabled. The Committee’s role was never to supercede that of the Internal Revenue Service in determining the operational

³ To further this important purpose, on June 18, 2004, the JWOD program became a mandatory source of supplies and services when the supplies or services have been added to the Procurement List maintained by the Committee. 68 Fed. Reg. 34,229 (June 18, 2004)(amending FAR 8.002, FAR 8.003 and FAR 8.703).

qualifications necessary to qualify for and maintain a tax-exempt status. Nowhere in the legislative history is there support for the Committee's regulation of the daily activities and internal operations of the JWOD affiliated agencies as to complex issues of executive compensation and nonprofit trusteeship. Nor is there any suggestion in the legislative history that Congress ever thought the Committee should preempt state Attorneys General and consumer protection agencies in assessing the qualifications of hundreds of nonprofit organizations. Instead, the Committee's authority was limited to assessing the fair market value for relevant goods and services, whether the nonprofit agencies employed blind or disabled individuals for 75 percent of the man-hours devoted to produce those goods or services, and whether the mission and operation of such organizations was devoted to the interest of blind and disabled citizens. See 41 U.S.C. §§ 47(a)(1)(b) (determine fair market prices), 48b(3)(A) & (4)(A) (operated in the interest of blind and disabled individuals), and 48b(3)(C) & (4)(C) (75 percent of man-hours by blind and disabled individuals).

If it had so intended, Congress had every opportunity to assert that that compensation and governance were matters necessary to carry out the purposes of the JWOD Act. Congress could have easily amended the JWOD statute to include these powers in 1971 and at other times. Instead, Congress chose to specifically articulate the circumstances under which the Committee was authorized to promulgate regulations as to the priority to be given to commodities produced or offered for sale by nonprofit agencies for the blind or other severely handicapped, as well as to make a continuing study and evaluation of the Committee's activities under the Act to ensure effective and efficient administration of the Act. None of the enumerated powers and responsibilities granted the Committee the authority to promulgate rules regarding executive compensation and governance.

The Proposed Rulemaking Violates Longstanding Principles of Equal Protection

The Committee's proposed rulemaking raises significant constitutional questions relating to the fundamental principles of equal protection. Any regulation of board governance and executive compensation as a precondition to qualification as a source for federal procurement is without precedent. By isolating charitable nonprofit entities and making their participation in government contracting contingent upon a certain corporate governance structure and limits on executive compensation to be consistent with that of career Federal government employees, the Committee has attempted to make only JWOD affiliated agencies subject to this unique level of regulation and compliance. Consequences for failure to comply with the proposed rules would also be unique to the nonprofit agencies. There is no rationale for such disparate treatment of nonprofit organizations desiring to participate in government contracting through the JWOD program by establishing a cap on executive compensation or imposing governance rules.

Other Regulatory Systems Adequately Protect The Public Interest

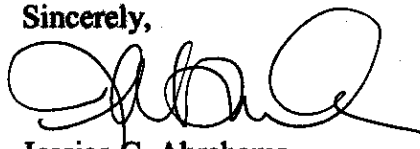
As set forth in detail in NAEPB's December 13, 2004 comments on the proposed rulemaking, there is no need for the Committee to attempt to assume regulatory authority over the governance standards for nonprofit organizations that are already regulated by numerous

local, state, and federal governmental entities. Further, the information sought by the Committee in the new "Committee Form 405" certification is publicly available in every 501(c)(3) organization's annual filing with the IRS of a Form 990. Accordingly, the proposed rulemaking promotes additional oversight by the Committee that is duplicative, redundant, and serves no added purpose other than to impose arbitrary and counterproductive restrictions on the ability of many nonprofit organizations to sell their products and services to the federal government.

Conclusion

For all of the reasons stated above, NAEPB respectfully submits that the Committee's proposed rulemaking is unlawful as it exceeds the Committee's authority and the scope of its Congressional mandate. Moreover, if finalized, the proposed rules will likely result in the reduction of employment and training opportunities for the blind and severely disabled, consequences that are squarely at odds with the fundamental purpose of JWOD. Accordingly, NAEPB respectfully requests that the proposed rulemaking be withdrawn.

Sincerely,



Jessica C. Abrahams